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No. 96-320

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,
Petitioner,

v.

MICHAEL BUCKLEY,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Daniel J. Popeo
Counsel of Record
Penelope Kilburn Shapiro
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

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QUESTION PRESENTED

May mere exposure to a potentially harmful substance, in the absence of any physical injury or even symptom, be a sufficient basis for recovery under the Federal Employers' Liability Act?

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INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all fifty states. WLF seeks to promote and protect the free enterprise system and the economic and civil liberties of individuals and businesses. In particular, WLF has devoted substantial resources to curbing abusive litigation practices, excessive punitive damage awards, excessive attorneys' fees,

and unwarranted expansion of tort liability by publishing monographs and similar educational materials on these subjects, and by filing *amicus curiae* briefs in appropriate cases. *See, e.g., Consolidated Rail Corp. v. Gottshall,* 114 S. Ct. 2396 (1994); *Burlington Northern Railroad Co. v. Ford,* 112 S.Ct. 2184 (1992); *TXO Production Corp. v. Alliance Resources Corp.,* 113 S. Ct. 2711 (1992).

WLF believes that the decision below in this case is a radical departure from the common law of tort liability and the law of liability under the Federal Employers' Liability Act (FELA). If left intact, this decision will impose significant costs on all businesses, both within the FELA context and without. These increased costs will ultimately be borne by consumers, workers, and society as a whole. WLF thus brings a broader perspective to the issues in this case than that presented by the parties in this action.

WLF is filing this brief with the consent of Petitioner and Respondent. Consent letters have been lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

The decision below improperly permitted a plaintiff, who manifests no physical effect whatsoever from exposure to asbestos, to assert a claim under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, for negligent infliction of emotional distress based on his general, non-severe anxiety regarding his future health. This ruling is directly contrary to the holding of this Court in *Consolidated Rail Corp. v. Gottshall,* 114 S.Ct. 2396 (1994), is contrary to the overwhelming weight of common law authority in the area, and represents a radical expansion of tort liability.

In *Gottshall*, this Court recognized only a single, narrow exception to the general requirement that emotional distress must be accompanied by an underlying physical injury to be compensable. The "zone of danger" exception articulated by the Court in *Gottshall*, simply does not apply in the context of the instant case and was misapplied by the Second Circuit. Instead, this case much more closely parallels the claim asserted in the companion case, *Carlisle v. Consolidated Rail Corp.*, 990 F.2d 90 (3d Cir. 1990), which was rejected outright by this Court in *Gottshall*. There, this Court held that an employee's anticipatory, wholly speculative fear of physical injury cannot support a cognizable claim under FELA.

This limitation on liability for negligently-inflicted emotional distress is supported by sound policy concerns. Potential liability for mental distress claims of the sort asserted by petitioner would be far too vast, and their incidence much too unpredictable. In the particular context of asbestos litigation, allowing claims based solely on emotional distress may exhaust the available resources of asbestos defendants and severely prejudice those who actually develop debilitating asbestos-related disease. If the doors of the courthouse are thrown open wide enough to admit those that do not yet have *any* physical effect of their exposure, there may be little or no monies remaining for those that become diseased several years down the road.

Finally, contrary to the assertions of Respondent, this case is not unique and the application of the decision handed down by this Court will not be limited solely to a few FELA plaintiffs asserting claims for asbestos exposure. Rather, this Court's decision will determine whether a defendant can be liable, based on simple negligent conduct, for the emotional

distress that an individual may develop because of any increased exposure to a harmful substance.

In short, the Second Circuit's decision is a significant and troubling one that is directly contrary to existing authority and will have far-reaching effects if it is upheld. For these reasons and the reasons set forth below, the Washington Legal Foundation (WLF) respectfully urges this Court to reverse the decision below.

ARGUMENT

I. THE MENTAL DISTRESS COMPLAINED OF CANNOT SUPPORT A CAUSE OF ACTION UNDER FELA OR THE COMMON LAW

The mental distress asserted by Buckley -- general, non-severe worry regarding potential future illness because of his exposure to asbestos while on the job -- cannot support a cause of action under the Federal Employers' Liability Act or the applicable common law. This Court's decision in *Consolidated Rail Corp. v. Gottshall,* 114 S. Ct. 2396 (1994), and numerous decisions of lower courts dealing with asbestos exposure, make clear that an employee may not recover solely for "fear" of developing a future illness unless and until he has some physical injury because of the exposure. Simply put, general free-floating anxiety regarding the possibility of a speculative future injury, unconnected with any current physical symptoms of such an injury, is not compensable under FELA or the common law from which FELA gleans its liability standards.

A. This Court's Decision in *Gottshall* Establishes That Buckley Cannot State A Claim Solely For His Anxiety Over A Speculative, Future Injury

In *Gottshall*, this Court first considered "under what circumstances emotional distress may constitute `injury' resulting from `negligence' for purposes of the [FELA] statute." 114 S. Ct. at 2403.[1] The Court had before it in *Gottshall* two consolidated claims for negligent infliction of emotional distress. One derived from an alleged on-going program of stressful and dangerous working conditions that led to an employee's mental breakdown, and the other arose out of a specific, harrowing incident in which a worker collapsed and died causing severe fright and long-term trauma to a co-worker who witnessed the death. The underlying decisions of the Third Circuit had found both claims to be compensable because the mental distress was "genuine and serious" and was a foreseeable outcome of the employers' negligent actions. *Gottshall,* 114 S.Ct. at 2408.

This Court rejected the lower court's analysis as unworkable and unsupported by the common law. While this Court found for the first time that a claim of negligent infliction of emotional distress could be asserted under FELA, it recognized the very real dangers inherent in such a cause of action. According to this Court, claims of negligent infliction of emotional distress must be strictly limited for two important reasons -- the potential for fraudulent and trivial

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[1] Section 1 of FELA provides that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51.

claims and the prospect of "unpredictable and nearly infinite liability for defendants." *Id.* Focusing on the latter consideration, this Court emphasized that the "genuineness" test articulated by the Third Circuit would provide employers with "no standard against which to regulate their conduct," 114 S. Ct. at 2409, and would subject employers to liability essentially any time an employee had an adverse emotional response to an employer's negligent action. Because the only check on liability would be the severity of the employee's reaction, courts "would be forced to make highly subjective determinations concerning the authenticity of claims for emotional injury, which are far less susceptible to objective medical proof than are their physical counterparts." *Id.* This approach would lead to unacceptable *ad hoc* decision-making and would cast the net of employer liability far too broadly.

This Court then reversed the Third Circuit and established a far narrower test for determining when a plaintiff may pursue a claim under FELA *solely* for emotional harm without any accompanying physical injury. The Court adopted the "zone of danger" test, holding that the sole exception to the general rule that emotional harm is compensable only when linked to a physical injury is where the employee -- although in fact unhurt physically -- was within the immediate vicinity of an accident or incident and was threatened with imminent physical injury. In other words, where a ceiling collapses due to negligence, it will be no defense to liability if the employee standing under it was able to leap to safety at the last moment and avoid physical injury. 114 S. Ct. at 2406, 2410.

In restricting valid claims for negligent infliction of emotional distress in this manner, this Court explicitly recognized that certain individuals who suffered real and

severe emotional harm would not be entitled to recover under the law. *Gottshall*, 114 S. Ct. at 2411. This Court reasoned that numerous important policy concerns, including "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability," argue against providing a cause of action for all persons who have suffered emotional harm due to their employers' negligent actions. *Id.*

Contrary to the Second Circuit's conclusion in the instant case, the zone of danger exception provides no basis for Mr. Buckley to recover here. Indeed, none of the traditional elements of the zone of danger test is present where a plaintiff is seeking to recover for the increased anxiety he feels because of exposure to a potentially dangerous agent, such as asbestos. There was no accident or singular traumatic event here. Mr. Buckley is not in any imminent danger of developing a physical disease or impairment; indeed, his general anxiety is the result of his inability to determine for as many as twenty to thirty years whether he has been harmed in any way by his exposure. Finally, Mr. Buckley does not allege that he suffered a severe fright that led to emotional injury. *See Gottshall,* 114 S. Ct at 2406, 2410-11 (discussing traditional elements of zone of danger test and citing cases).[2]

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[2] Indeed, Mr. Buckley appears explicitly to concede in his opposition to the writ of certiorari that his emotional reaction to his exposure has not been "severe," *see* Respondent's Brief In Opposition to the Petition for Writ of Certiorari at 14-17, and asserts only that he has "an appropriate level of distress," *id.* at 5, because of his employer's negligent action. This failure to even allege, let alone establish, an acute emotional reaction to his exposure to asbestos removes Mr. Buckley from the zone of danger paradigm and bars his recovery.

Rather, Mr. Buckley's claim is more akin to the claim pursued by the companion plaintiff, Mr. Carlisle, which this Court dismissed outright in the *Gottshall* decision. Mr. Carlisle was a train dispatcher who alleged that the dangerous working conditions that Conrail imposed upon him -- including requiring him to rely on outdated and unsafe equipment, demanding that he work long and arduous shifts, and subjecting him to the supervision of an alcoholic boss -- caused him to suffer severe emotional distress. *Carlisle v. Consolidated Rail Corp.*, 990 F.2d 90, 92-93 (3d Cir. 1993); *see also Bloom v. Consolidated Rail Corp.*, 41 F.3d 911, 914 (3d Cir. 1994) (describing the cause of Mr. Carlisle's stress as the pressure "to achieve on-time performance" and "to ignore safety concerns that would slow the movement of trains"). This Court overturned the Third Circuit and directed that judgment be entered against Mr. Carlisle. In doing so, this Court reasoned that such a claim "plainly does not fall within the common law's conception of the zone of danger," and ruled that FELA does not provide any remedy for work-related stress arising from unsafe or arduous working conditions. *Gottshall,* 114 S. Ct. at 2411-12.

Mr. Buckley's claim is similar to that of Mr. Carlisle. Mr. Buckley claims that the unsafe working conditions negligently created by Metro-North, i.e., the failure to protect him adequately against asbestos exposure, have caused him to fear that he may develop cancer or another physical impairment at some point in the future. Mr. Carlisle's claim was closely analogous. Mr. Carlisle claimed that the unsafe conditions under which he was forced to work made him fearful and overwrought. More specifically, he alleged that the dangerous working conditions negligently created by his employer caused him to be afraid that he would someday harm himself severely in performing his job duties or that he

would cause injury to passengers or freight at some future time. According to Mr. Carlisle, the stress of this fear ultimately led to a mental breakdown. In rejecting Mr. Carlisle's claim, this Court concluded that this sort of generalized worry about possible future harms, even where the emotional distress it caused was severe, can not support a cause of action under FELA.

The logic of the *Gottshall* decision regarding Mr. Carlisle's claim dooms Mr. Buckley's claim and demonstrates the fallacy of the Second Circuit's decision here. Certainly, if a negligently unsafe aspect of Mr. Carlisle's job had *actually* resulted in physical injury to him, he would have been entitled to assert a claim against Conrail for his physical injuries and any accompanying emotional distress. Prior to any such injury, however, his anticipatory concern regarding safety issues, no matter what emotional trauma it may have led to, was not a compensable injury under FELA or the common law.

Analogously, on the facts of this case, if Mr. Buckley, in fact, suffers a physical impairment as a result of his exposure to asbestos, he will be allowed to pursue a claim for that physical injury and the accompanying, if any, emotional distress. In this way, Mr. Buckley will not be deprived of a remedy in the admittedly unlikely event that he should develop an asbestos-related impairment at some time in the future. *See Simmons v. Pacor*, 674 A.2d 232 (Pa. 1996) ("Appellants are not left without a remedy for their mental anguish. . . [They can bring an action] if cancer develops. It is in this action that Appellants can assert their emotional distress or mental anguish claims."). Until such time as Mr. Buckley develops any such physical impairment, however, his

anxiety is wholly speculative and cannot support a claim under FELA.

B. The Lower Courts Have Consistently Rejected, Both in the FELA and Common Law Contexts, The Speculative Claim Asserted By Mr. Buckley

The Second Circuit's decision below is at odds with most, if not all, of the lower court decisions to consider the type of claim presented here. In numerous recent, well-reasoned opinions, the courts dealing with asbestos and other toxic tort litigation have rejected claims for emotional distress based solely on exposure and fear of potential future injury.

For example, United States District Judge Charles Weiner, who presides over the federal multi district asbestos personal injury litigation, recently dismissed the claims of a group of plaintiffs that alleged emotional distress from exposure only without any physical injury. Following the reasoning of the Pennsylvania Supreme Court in *Simmons*, 674 A.2d at 238, which distinguished between the concepts of "physical impact" and a "physical injury," Judge Weiner held that the inhalation of asbestos fibers was not a compensable physical injury. *In re Asbestos Prods. Liab. Litig. (No. VI)*, CA No.2 MDL 875, 1996 WL 239863, at *14-15 (E.D. Pa. May 2, 1996) (discussing both FELA and Jones Act claims). According to Judge Weiner and the Pennsylvania Supreme Court, even assuming that the inhalation of asbestos fibers could be characterized as a physical impact or injury, it was not sufficient standing alone to support a tort action for emotional harm. "[P]hysical injury sufficient to maintain a tort action must be accompanied by *harm*," by which the court plainly meant *physical* harm. *Id.* (emphasis added); *see Simmons*, 674 A.2d at 238 (asymptomatic pleural thickening

is not sufficient physical injury to allow recovery of emotional distress damages).[3] Without any accompanying physical *harm*, the metaphysical physical impact or injury caused by the inhalation or ingestion of a substance does not support an independent tort action for emotional distress.

Numerous other courts have reached the same conclusion in a variety of contexts. *See, e.g., Redland Soccer Club v. Dept. Of Army*, 55 F.3d 827, 846 (3rd Cir. 1995) (affirming dismissal of homeowners' claims for emotional distress caused by exposure, through ingestion and inhalation, to allegedly contaminated field because no plaintiff had any physical injury from exposure); *Ball v. Joy Techs., Inc.*, 958 F.2d 36, 38 (4th Cir.) *cert. denied*, 502 U.S. 1033 (1992) ("mere exposure of the plaintiffs to toxic chemicals does not provide the requisite physical injury to entitle plaintiffs to recover for their emotional distress"); *In re Hawaii Federal Asbestos Cases*, 734 F. Supp. 1563 (1990) (requiring underlying compensable harm such as some functional impairment from asbestos exposure before recovery may be had for mental anguish); *Bondy v. Texas Eastern Transmission* Corp., 701 F. Supp. 112, 114 (M.D. La. 1988),

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[3] The Pennsylvania Supreme Court specifically rejected the argument advanced by Mr. Buckley here:

> We decline to adopt Appellants' view that the pleural thickening establishes a sufficient "impact" to warrant recovery for mental anguish. Those cases which base recovery on an "impact" rather than an injury involve plaintiffs who have witnessed a traumatic physical injury to a close family member. The instant circumstances are not analogous since we have held that no physical injury to any party has been established.

Simmons, 674 A.2d at 238 (citations omitted).

aff'd, 872 F.2d 422 (5th Cir. 1989) (requiring PCB-related physical injury before plaintiff may recover for mental anguish arising from exposure to PCBs); *Fontroy v. Owens*, CA No. 86-4958, 1996 U.S. Dist. LEXIS 14717 (E.D. Pa. October 2, 1996) (absent physical impairment "fear of asbestos-related cancer is not a compensable injury"); *Martin v. Vaughn*, CA No. 92-3828, 1995 U.S. Dist. LEXIS 10851 (E.D. Pa. May 30, 1995) (mental anguish from fear of contracting HIV virus is "conjectural" or "hypothetical" injury and does not provide plaintiffs with standing to pursue claims for emotional distress).

In sum, the Second Circuit's decision is contrary to the virtually uniform common law precedent that has refused to recognize claims solely for fear of future, speculative adverse health consequences because of exposure to harmful substances.

II. THE IMPORTANT PUBLIC POLICIES OF PREVENTING UNLIMITED LIABILITY FOR EMPLOYERS AND ENSURING ADEQUATE RECOVERY FOR ALL PHYSICALLY INJURED EMPLOYEES REQUIRE THE REVERSAL OF THE DECISION BELOW

The *Gottshall* decision and the decisions cited above have been based explicitly or implicitly on two important public policy goals: (1) the need to avoid exposing employers to virtually unlimited, unpredictable, and unverifiable claims; and (2) the need to compensate fairly and adequately those individuals that are physically injured and to avoid windfall awards to persons who never suffer any physical injury. Each of these important public policy concerns is present in this

case and argues strongly for the reversal of the Second Circuit's decision below.

A. The Prospect Of Unlimited And Unpredictable Employer Liability Supports The Dismissal Of Mr. Buckley's Speculative Claim

The Court made plain in *Gottshall* that concern regarding the specter of unpredictable and unlimited liability for employers was paramount. 114 S. Ct. at 2408-09, 2411. This concern arises from the highly variable emotional responses of different persons to a particular event, and from the large number of persons that may be emotionally effected by an employers' negligent action. *Id.* at 2409. Thus, this Court concluded that any rule of liability broader that the zone of danger test could cause employers "to face the potential of unpredictable liability to a large number of employees far removed from the scene of the allegedly negligent conduct." *Id.*

In addition, the courts have been sensitive, as they must be, to the significant potential for abuse inherent in emotional distress claims. As one court aptly put it:

> the specter of unlimited liability from an army of plaintiffs parading their tumescent fears into the courtroom supported by a corps of psychiatrists has resulted in proper judicial restraint in this area. Fear is a widespread phenomenon, highly subjective, contagious and capable of being feigned.

Carroll v. Litton Systems, Inc., CA No. B-C-88-253, 1990 U.S. Dist. LEXIS 16833 (W.D. N.C. October 29, 1990), *quoting*, *Arnett v. Dow Chemical Co.*, No. 729586, slip op. at

19 (Cal. Super. Ct., San Francisco County, March 21, 1983). Each of these concerns is applicable in the context of the instant case. If this Court were to uphold the Second Circuit's decision, it would significantly increase the liability of railroad and other employers in any number of contexts.[4]

In the arena of asbestos litigation alone, the effect of the Second Circuit's decision will be dramatic. As this Court certainly is aware, asbestos litigation is a huge and potentially crippling problem for the United States court system, and, indeed, for the United States economy. Tens of thousands of personal injury and wrongful death lawsuits seeking recovery for asbestos-related disease have been filed in state and federal courts over the past twenty-five years.[5] While it is not possible to determine precisely the number of workers and individuals that have been exposed to asbestos, experts have estimated that more than 21 million workers were significantly exposed to asbestos in the 40 years prior to 1980. *See Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1337 (5th Cir. 1985), *citing*, I. Selikoff, *Disability Compensation for Asbestos-Associated Disease in the United*

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[4] As discussed below, *infra* at 19-20, despite respondent's protestations, the increased scope of liability will not be limited to railroad employers. Just as FELA is informed by the common law, *Gottshall*, 114 S. Ct. at 2403, the common law is influenced by this Court's pronouncements of tort law under FELA.

[5] The size of the pending asbestos caseload remains a matter of grave concern. As Judge Weiner, who presides over the federal multi district asbestos personal injury litigation, recently noted, the total number of asbestos cases that have been filed in the multi district proceeding is 58,478, and only approximately 20,000 of these have been resolved to date. *See In re Asbestos Prods. Liab. Litig.*,1996 WL 239863, at *5 (E.D. Pa. May 2, 1996).

States, Environmental Sciences Laboratory, Mt. Sinai School of Medicine of the City University of New York (1981).

If the Second Circuit's decision is affirmed, there would be, for all intents and purposes, no limit to the class of plaintiffs that would be entitled to sue for negligent infliction of emotional distress. Literally any worker that had any regular contact with asbestos fibers in the work place, and there are certainly millions of such individuals, would be entitled to sue for any increased worry and concern they might have as a result of that exposure. An employer's liability would be nearly limitless and entirely unpredictable. As the Third Circuit concluded,

> If mere exposure to asbestos were sufficient to give rise to a F.E.L.A. cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious that proof of damages in such cases would be highly speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do.

Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 942 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985).

Moreover, this decision will not be limited to asbestos claims or to the employment context. Beyond asbestos, employers could potentially be liable for any negligently-created working condition that increased an employee's anxiety about his future health. Employees who worked with and inhaled toxic gases or chemicals, or even employees that inhaled secondhand smoke in the work place, could assert claims for negligent infliction of emotional distress based solely on their increased worry about developing cancer or other diseases. A worker that worked around and absorbed the emanations from high-powered electric lines could potentially sue based on the presence of electromagnetic fields that increased his anxiety about getting brain cancer. Similarly, individuals that inhaled or ingested allegedly toxic substances from negligently contaminated land, water supplies, or foodstuffs could sue simply for the increased anxiety this caused them without having to establish any physical effect whatsoever from the ingestion. This is precisely the sort of unlimited, unpredictable, and unprincipled liability that this Court denounced in *Gottshall*.

B. Allowing Recovery Solely For Anxiety Will Result In Windfalls To Uninjured Plaintiffs and Will Divert Existing Judicial And Financial Resources From Physically-Impaired Individuals

At bottom, damage awards for negligent tort actions are designed fairly to compensate the claimant for actual damages incurred. If claims for fear of cancer are allowed to proceed, significant inequities will inevitably result. Those who suffer no physical injury may receive substantial windfall awards, while others that have considerable physical impairment may ultimately be under compensated.

Damages awarded for fear of cancer are necessarily wholly speculative. To allow such awards would contravene longstanding principles against allowing the award of speculative damages, and any award will suffer the same deficiencies cited to deny speculative damages. Specifically, in the instant context, those individuals that receive a damage award for their anxiety and never develop any physical impairment, and the overwhelming majority of plaintiffs will fall into this category, will have received a windfall -- that is, compensation for their anticipatory worry about a potential result that did not, in fact, occur. *See Schweitzer,* 758 F.2d at 942 (award of damages for fear of cancer is wholly speculative and necessarily would lead to unfair results); *Simmons*, 674 A.2d at 238 (same). Moreover, because of the speculative nature of these damages, damage awards for fear would be subject to few, if any, objective limitations or standards. These awards are likely to vary widely, resulting in huge awards to some and little to others.[7]

At the same time, the pursuit of these anticipatory claims for mental distress, if allowed, will divert limited judicial and financial resources from those who suffer from physical impairments due to asbestos. As Judge Weiner poignantly noted in dismissing a class of plaintiffs that alleged no physical impairment:

> Although this Court retains a vigilant concern for all parties to the litigation, the Court has prioritized from the onset the victims of asbestos-related

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[7] The lack of limiting standards and the prospect, therefore, of a substantial jury award for fear and anxiety will likely serve only to encourage the filing of more claims for negligent exposure to asbestos and other harmful substances.

> disease, and in particular, those who suffer with malignant conditions as well as their families. The Court's focus is to administer these cases as it has all the others by seeing that they are resolved in an equitable and expeditious manner either by settlement or by trial while making certain there will be sufficient resources available to compensate those who are deserving.

In re Asbestos Prods. Liab. Litig., 1996 WL 239863, at *18.

As this Court is undoubtedly aware, neither the nation's judicial resources nor the resources of asbestos defendants are infinite. The bankruptcy filings of numerous asbestos manufacturers attest to the unavoidable fact that there is a limited amount of money available to compensate those individuals injured by asbestos, and that pool of funds may be exhausted at some point. For this reason, experts have counseled that claims should be addressed in the order of their severity. *See, e.g.*, Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv.J.L. & Pub. Pol'y 541 (1992); *In re Asbestos Prods. Liab. Litig.*, 1996 WL 239863 at *5 (dismissing claims of asymptomatic plaintiffs because they "waste this Court's time. Other victims suffer while the Court is clogged with such filings.").[8]

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[8] The very real possibility that future claimants may have no practical recourse against bankrupt asbestos defendants was recognized by the Judicial Conference Ad Hoc Committee on Asbestos Litigation appointed by Chief Justice Rehnquist, which reported that:

> [D]ockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the

(continued...)

Certainly, the interests of individuals such as Mr. Buckley, who have no physical impairment and only generalized anxiety about their future health, should not be placed ahead of those that have suffered or will suffer physical injury because of their asbestos exposure.

Finally, allowing asbestos plaintiffs, such as Mr. Buckley, to recover for their "fear of cancer" alone, may ultimately under compensate them if they actually do develop an asbestos-related impairment. FELA has traditionally been a single recovery statute, meaning that a plaintiff may sue only one time for injuries arising from a particular wrongful act of the employer. *See Mellon v. Goodyear*, 277 U.S. 335, 344 (1928); *Flynn v. New York. N. H. & H. R. Co.*, 283 U.S. 53, 56 (1931). While some courts have modified this rule in the context of latent diseases, this issue has not been finally resolved in the context of a FELA claim for negligent infliction of emotional distress.[9] The Second Circuit here explicitly ruled that Mr. Buckley can recover only for his current emotional harm and not for the risk of contracting an

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[8](...continued)
victim's recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (March 1991), p. 3. These deficiencies in the current system will only be exacerbated if claimants alleging only fear of asbestos injury are permitted to pursue claims.

[9] Significantly, Mr. Buckley provides no support for his bald assertion that a "FELA claim for the negligent infliction of emotional distress is separate and distinct from a FELA manifest physical injury claim." Respondent's Brief in Opposition to the Petitioner for Writ of Certiorari at 13 n.5.

asbestos-related disease at some future date. (A-18, n.1) If Mr. Buckley ultimately develops a physical impairment, it is not clear that he will be able to pursue a second claim against Metro-North for his physical injury. Thus, if his claim is allowed to go forward now, Mr. Buckley could potentially end up considerably *under compensated* for injuries caused by his asbestos exposure.

C. Mr. Buckley's Situation Is Not Unique And Allowing Him To Recover For Fear Will Set A Far-Reaching Precedent

Mr. Buckley essentially concedes that allowing him to pursue a claim for fear of future disease will expand the current tort law, and devotes much of his argument to assuring this Court that such an expansion will effect only a narrow group of potential claimants. Specifically, respondent claims that this Court's decision will apply only to railroad employees covered by FELA, *see* Respondent's Brief In Opposition to Petition for Certiorari at 7, and will apply only to those employees that have "massive" or "significant" exposure to asbestos. *Id.* at 8. Neither of these limiting arguments is persuasive.

The first limiting principle respondent raises -- that this decision will have no application outside the FELA context -- can be easily disposed of. As this Court noted in *Gottshall*, FELA decisions are informed by the common law, especially in the context of the claim asserted here. 114 S. Ct. at 2404 ("Because FELA is silent on the issue of negligent infliction of emotional distress, common-law principles must play a

significant role in our decision.")[10]; *see Atchison, Topeka & Santa Fe Railway*, 480 U.S. 557, 569 (1987) ("FELA jurisprudence gleans guidance from common-law developments"). Thus, this Court's FELA decisions are explicitly based on the Court's interpretation of the current status of the tort law landscape. It therefore makes little sense to argue that lower courts will not be influenced by this Court's pronouncements as to its views of the settled principles and/or emerging trends in modern tort law.

Respondent's "significant exposure" test is also not an effective limit. At the outset, it is precisely the same sort of "highly subjective," "fact-specific test" as the genuineness inquiry that this Court declared unworkable in *Gottshall*. 114 S. Ct. at 2409. How much exposure is "significant" would be bound to vary with every court and with every harmful substance, leading to the imposition of haphazard and inconsistent liability on defendants.

Respondent appears to recognize this difficulty and attempts to link the "significant exposure" test to a known standard. How much exposure does Respondent think is significant? Evidently, any amount that exceeds the current Occupational Safety and Health Administration (OSHA) guidelines for the presence of asbestos in the workplace. The breadth of the liability advocated by Respondent is thus truly

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[10] Indeed, this Court specifically scolded the Third Circuit for ignoring the common law. 114 S. Ct. at 2408 ("By treating the common-law tests as mere arbitrary restrictions to be disregarded if they stand in the way of recovery on `meritorious' FELA claims, the Third Circuit put the cart before the horse: the common law must inform the availability of a right to recover under FELA for negligently inflicted emotional distress, so the `merit' of a FELA claim of this type cannot be ascertained without reference to the common law.").

staggering. Any time that an employer negligently violated an applicable OSHA guideline, it could be liable for any resulting anxiety in its work force. Similarly, any defendant that negligently violated any environmental or other agency guideline at any of its sites could be liable to surrounding residents or others who were exposed to the site.[11]

Finally, there is the suggestion throughout both Respondent's Brief in Opposition to the Petition for Certiorari and the Second Circuit's decision that Metro-North must be punished for its allegedly egregious conduct here. It is important to remember, however, that no ultimate findings of fact exist on these issues because the District Court directed a verdict in favor of Metro-North at the close of Mr. Buckley's case. *Buckley v. Metro-North Commuter R.R.*, No. 89 Civ. 7170-A (WK), 1995 WL 110380 (S.D.N.Y. March 15, 1995). Further, Mr. Buckley's claim is for *negligent* infliction of emotional distress, and does not assert any intentional wrongdoing. Thus, the only issue before the Second Circuit and now this Court is whether, based on simple negligence, a defendant can be required to compensate its employees for emotional distress if they are exposed to asbestos at some indeterminate level above normal background amounts. It is broadly recognized that punishment is not an appropriate goal of negligence law. *See* Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm -- A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 504 (1982).

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[11] The number of persons who believe that they have been "significantly" exposed to harmful substances is demonstrated vividly by the number and variety of cases that already have been brought attempting to recover for emotional distress. *See supra* at p. 11-12.

In sum, the Second Circuit, unlike virtually every other court to consider this issue, has ruled that individuals that have ingested, inhaled, or otherwise absorbed a potentially harmful substance because of another's simple negligence may sue for any increased anxiety that this causes them. The breadth of this ruling, if affirmed by this Court, will have a substantial detrimental effect on the judiciary, business defendants, and physically injured claimants.

III. THE DECISION BELOW WOULD MAKE EMPLOYERS' LIABILITY BROADER AND MORE UNPREDICTABLE, THUS MAKING IT MORE DIFFICULT TO INSURE

The decision below would expand employers' liability for emotional distress far beyond the boundaries of the zone of danger exception. The increased breadth and unpredictable nature of this liability will increase the cost and restrict the availability of liability insurance.

When considering claims for emotional distress, it is important to keep in mind that workplace mental distress is far more difficult for an employer to predict and prevent than physical injury. Physical injuries, which have a clear physical cause and effect, do not depend primarily on the individual characteristics of the plaintiff.[12] Emotional injuries, on the other hand, depend entirely on such characteristics. *See* Marc

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[12] While the emotional response of a plaintiff within the zone of danger is also dependent on his or her individual propensities, the zone of danger exception itself is premised on the occurrence of a particularly horrible accident or other singular physical event. For this reason, it is a much more limited area of liability than that created by the decision below.

A. Antonetti, *Labor Law: Workers' Compensation Statutes and the Recovery of Emotional Distress Damages In the Absence of Physical Injury*, 1990 Ann. Surv. Am. Law 671, 672. "Where a workman loses a finger because of an errant piece of machinery, the ascertainable injury and the work-related cause are direct and simple. However, emotional distress may have multiple causes, some work-related, others not so related." *Archer v. Indus. Comm'n*, 619 P.2d 27 (Ariz. Ct. App. 1980). Clearly, a worker's "personal subjective vulnerability" determines his or her reaction to job conditions, including job stress or exposure to toxic agents. Sara J. Sersland, *Mental Disability Caused By Mental Stress Cases*, 33 Drake L. Rev. 751, 757 (1983-84). Moreover, while asbestos-related diseases follow an etiology that allows their rate to be predicted with some statistical certainty, and historical claims rates can be used to predict the rate of industrial accidents, emotional distress claims have no such characteristic.

It is simply not possible to estimate with any degree of certainty the number of persons that may have an adverse emotional response to exposure to asbestos or to any other unsafe working condition. The unpredictability of emotional distress, and therefore of liability for emotional distress under a negligence standard, will have an important economic consequence: it will reduce the availability and increase the cost of liability or workers' compensation insurance. Insurance requires that risk be statistically predictable over the long term. *See* Peter W. Huber, *Liability: The Legal Revolution and Its Consequences* 136-37 (1988); Kenneth S. Abraham, *Making Sense of the Liability Insurance Crisis*, 48 Ohio St. L.J. 399, 404-09 (1987). Insurers do not have the means to make the predictions about the incidence and severity of emotional distress claims that are necessary to

price an insurance product efficiently. Employers will therefore find liability insurance more difficult to find and more costly to purchase.[13] These increased costs will be passed on, in whole or in part, to workers, in the form of lower wages, and/or consumers, in the form of higher prices.

IV. THE APPLICATION OF THE STATUTE OF LIMITATIONS TO CLAIMS FOR FEAR OF FUTURE ILLNESS IS UNWORKABLE

Finally, allowing Mr. Buckley's speculative claim to proceed would not only represent bad policy, it will also lead to practical problems in the prosecution of such claims. Specifically, the relevant statute of limitations issues would be exceedingly difficult to adjudicate.

The application of a statute of limitations depends on a determination as to when the claim being asserted arose. Virtually every court that has considered asbestos claims in this context has determined that no claim arises "until an objectively verifiable functional impairment develops." *In re Hawaii Federal Asbestos Cases*, 734 F. Supp. 1563, 1570 (D.

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[13] As stated by the dissenting judge in *Vallery v. Southern Baptist Hospital*, 630 So.2d 861, 870 (La. App. 1993):

> Where insurance companies cannot quantify a certain risk, the cost of insurance can be out of all proportion to the risk. [Allowing individual to recover for fear of AIDS without an physical injury] would add another costly layer of inordinate expense to the treatment of AIDS without doing anything to advance the treatment of AIDS. From a public policy perspective, this would represent a very poor allocation of health care dollars at a time when money for AIDS is insufficient in particular, and the cost of health care in general is in crisis.

Hawaii 1990); *accord Simmons v. Pacor, Inc. et. al.*, 674 A.2d 232 (Pa. 1996); *Locke v. Johns-Manville Corp.*, 275 S.E.2d 900 (Va. 1981). This is consistent with the precedent of this Court. *See Urie v. Thompson*, 337 U.S. 163, 170 (1949) (worker exposed to silica dust sustains injury and cause of action accrues only as of time that adverse effects first manifest themselves). Thus, the development of a physical injury is the triggering event, and the applicable statute of limitations begins to run from that time.[14]

With a claim solely for emotional distress, entirely unconnected to any physical event, injury, or even symptom, there is no objectively verifiable triggering event to begin the running of the statute of limitations. A plaintiff could arbitrarily set the date on which his emotional distress developed. This date could be manipulated to achieve the largest recovery from an employer and/or its insurance companies. (For example, the date could be set just prior to or after a sale of the employing company, whichever was perceived to be most advantageous, or at a time when the employer's insurance coverage was greatest.) Because of the long incubation period of asbestos-related disease, there could be a twenty or thirty-year period over which a plaintiff could at any time decide that he could no longer cope with the fear of cancer and elect to pursue a claim for negligent infliction of emotional distress. Obviously, this significantly undermines the policy underlying statutes of limitations; i.e., that at some point in time the law should no longer recognize a claim.

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[14] Similarly, under the narrow "zone of danger" exception, the triggering event for the statute of limitations is a known physical accident of incident.

On the other hand, employers would likely argue that the statute of limitations for an emotional distress claim should begin to run at the time that the plaintiff "knew" all the facts about his exposure and the health risks of asbestos. Again, this is an unknown, virtually unverifiable date. Employers would gather evidence seeking to establish this event on the most convenient date for the employer. Insurance companies that may have provided coverage to the employer over different time periods would certainly weigh in to argue for a particular, advantageous start of the statute of limitations period.

In short, simply establishing the date on which the "claim" arose would be a highly fact-specific threshold inquiry that could require its own mini-trial to resolve. *See In re Hawaii*, 734 F. Supp. at 1570 (refusing to recognize a claim for fear of cancer in part because "[a] regime of recovery for emotional distress not anchored to an underlying compensable harm presents boundless headaches in adjudicating statute of limitations problems."). Such serious practical obstacles to adjudicating claims properly argue strongly against expanding tort liability in this manner.

In sum, there are considerable "costs" -- whether in the form of increased crowding of the courts, the potential for the exhaustion of available resources to compensate asbestos plaintiffs, or the direct costs associated with buying insurance coverage and paying claims -- that will result from the expansion of FELA liability in the manner directed by the Second Circuit. These costs will be borne by society as a whole to benefit a class of plaintiffs, the majority of whom *will never contract any form of asbestos-related disease.* This

is too great a price to pay and one which the law does not support.

CONCLUSION

For the foregoing reasons, WLF respectfully requests that this Court reverse the decision of the Second Circuit.

Respectfully submitted,

Daniel J. Popeo
Counsel of Record
Penelope Kilburn Shapiro
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302